IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1439
No. 74-1468

Supreme Court, U. S.
FILED
JUL 9 1975
MICHAEL RODAK, JR., CLERK

HARRY T. NUSBAUM, Judge of the Civil Court of the City of New York (Plaintiff-Intervenor),

Petitioner,

against

JOHN J. GHEZZI, individually and in his capacity as Acting Secretary of State of the State of New York; HERMAN KATZ, individually and in his capacity as City Clerk of the City of New York; et al.,

Respondents.

PIETRO C. RUBINO, for himself and all other persons similarly situated; and PHILIP J. ZICHELLO,

Petitioners,

against

JOHN J. GHEZZI, individually and in his capacity as Acting Secretary of State of the State of New York; et al.,

Respondents.

BRIEF FOR RESPONDENT GHEZZI AND PRO SE IN JOINT OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI

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Opinions Below

In the courts below, the opinion of the Court of Appeals for the Second Circuit is now found at 512 F. 2d 431, and is also reproduced at p. 1a (Appendix A) in both appendices

of the several petitions.* The opinion of the District Court is unreported and is reproduced as Appendix C, 9a.

Jurisdiction

Both petitions rely on 28 U.S.C. § 1254(1), to invoke the jurisdiction of this Court.

Questions Involved

Is a substantial federal question presented by the State constitutional and statutory requirement that judges retire at age 70?

Statement of the Case

The judicial petitioner in 74-1468 (*Rubino* v. *Ghezzi*) is a now retired judge who was elected to the Civil Court of the City of New York for a term starting January 1, 1970. Normally that term is for 10 years, N.Y.S. Const., Art. 6, § 15, subsec. a, but since the Judge, Philip J. Zichello, was born November 1, 1904, the State Constitution, Art. 6, § 25 and Judiciary Law § 23 mandated his retirement at the end of 1974, the year he attained 70 years. His successor has now been elected and is serving.

The other petitioner in 74-1468, Pietro C. Rubino, is a voter over 70, who alleged that he voted for Judge Zichello.

The petitioner in 74-1439 is a purported intervenor in the *Rubino* action. He is also a Judge of the Civil Court, elected at the same time as Judge Zichello but attains 70 in 1978, with mandatory retirement at the end of that year. This is one year prior to the end of the normal ten-year term (3a). It should be noted that while Judge Nusbaum

* In the interests of simplicity, reference will be made only to appendix pages in the *Nusbaum* petition (74-1439).

was permitted to intervene in the District Court (11a), he never filed any motion or pleadings to that affect as required by the Federal Rules of Civil Procedure, Rule 23(c).

The petitioners in *Rubino* sought preliminary and permanent injunctive relief against the enforcement of the mandatory retirement provisions cited, as well as the convening of a three-judge district court, 28 U.S.C. §§ 2281, 2284. The District Court, finding no substantial constitutional question, dismissed the action (9a). On appeal, the Court of Appeals for the Second Circuit, affirmed (1a). Seeing the questions as whether the constitutional grounds raised were "wholly insubstantial and frivolous" under the rule of *Goosby* v. *Osser,* 409 U.S. 512 (1973), the appeals court agreed with the District Court that the issue of age restrictions upon the term of state judges is a legislative one for the State. The effort to place it in a constitutional context was seen as frivolous.

Reasons for Denying Certiorari

A. The Court of Appeals was correct in determining the complaint frivolous

The only question properly before this Court is that raised by the *Rubino* petitioners (74-1468) as only they filed a complaint or any other papers in the District Court. Thus we are simply faced with whether a 70 year old retirement provision for state court judges (who happen to be elected) raises any constitutional question. In light of prior decisions of this Court, all current, it is submitted it does not. Thus in *Weisbrod* v. *Lynn,* 383 F. Supp. 933 (D.D.C. 1974), a three-judge court upheld mandatory retirement at age 70 for federal employees regardless of health or mental ability. This was affirmed. —— U.S. ——, 43 L. Ed. 2d 420 (Feb. 24, 1975). See also *McIlvaine* v. *Pennsylvania,* 6 Pa. Cmwlth. 505, 296 A. 2d 630 (1972),

affd. 309 A. 2d 801 (1973), app. dismd. 415 U.S. 986 (1974). By the rule of *Goosby* v. *Osser, supra,* the constitutional question presented is frivolous because it is foreclosed by prior Supreme Court decisions.

Any effort to clothe the instant matter in a First Amendment context is obviously frivolous, as the right to vote or be on the ballot is simply not involved. Opin., 2d Cir. (4a-5a). The judges involved were on the ballot and no one was prevented from voting for them.

B. The Limited Certification Procedure for Superior Court Judges does not deny equal protection to petitioners

Although not the crux of the complaint or even a question presented the petitioners contend that New York, by allowing Supreme Court, Appellate Division and Court of Appeals judges to be "certificated" for service past age 70, with an absolute maximum of 76, N.Y. Const., Art. 6, § 25, subd. b, violates their rights to "equal protection". This is a frivolous contention and quite correctly not even discussed in the Court of Appeals decision. This was not the basis of the complaint and peripheral to mandatory retirement. It is an obviously rational distinction to continue for a limited period the services of superior court judges, as opposed to inferior court judges. The service and experience of the former can be considered by the Legislature and the people more valuable than the latter. In this area of extension of service, reform, if that it really be, may be taken "one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." *McDonald* v. *Board of Election Commissioners,* 394 U.S. 802, 809 (1969) citing *Williamson* v. *Lee Optical of Oklahoma, Inc.,* 348 U.S. 483, 489 (1955).

The petitioner Nusbaum also appears to present the same untenable contention. The fact that Civil Court judges may be temporarily assigned to the Supreme Court by State constitutional provision is totally a matter for the

Appellate Division's discretion. N.Y. Const., Art. 6, § 26. Many non-elected judges also may be so temporarily assigned. Inferior court judges exercise the jurisdiction of the Supreme Court only while so temporarily assigned, but they do not achieve the status of the Supreme Court Justice, for the purpose of tenure and the fact of such assignment does not in any way affect the status of such civil court judges.*

CONCLUSION

The petitions for a writ of certiorari should be denied.

Dated: New York, New York, June 30, 1975.

Respectfully submitted,

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* We doubt that Judge Nusbaum has any right to be a petitioner as he failed to comply to Rule 24(c) of the Federal Rules of Civil Procedure in any way. The record below fails to reveal any pleading by him or even any adoption of petitioners Rubino and Zichello's pleading.